Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The central issues in the case have been thoroughly briefed.[1] The St. Louis Sergeants' and Lieutenants' ("Sergeants") reply is limited to three points: (1) the employer failed to carry its burden of proving by clear, affirmative and unmistakable evidence, that the Sergeants are exempt under any of the proposed constructions of the salary basis regulations; (2) the Department of Labor's legislative regulations and formal interpretations are due deference, but the Solicitor General's arguments on the application of those regulations to the facts are not; and (3) the Eleventh Amendment does not apply to this case.[2]

I. The Police Board's Burden.

The Board argues that this Court should reverse settled law by sustaining the holding that Sergeants are exempt and by imposing the burden of proving non-exempt status on the employee.

The Basics of the Burden. This Court long ago settled the question of whether an employer could assert entitlement to an exemption merely by treating a class of

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[1] The "window of correction" is discussed fully in the opening brief. The window should not be open after the initiation of litigation. The Police Board has not, to this day, made an unambiguous promise to comply with the application salary basis test and disciplinary docking rule in the future. Pet. Brf. at 43-45; and n. 14, below.

[2] Tenth Amendment issues addressed by *amici*, but not raised by the Respondents, are not before the Court. *See, United Parcel Service v. Mitchell*, 451 U.S. 50, 60 n.2 (1981).

employees as exempt and, thereafter, insisting that the employees bear the burden of proving they are covered. The Police Board's presumption that employees are exempt absent evidence to the contrary has things backwards. An employer may overcome the presumption of FLSA coverage only by clear, affirmative and unmistakable evidence of exempt status. *See, Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987); and Pet. Brf. at 21-23.

The burden rests with the Police Board for many reasons: (1) the FLSA is a remedial statute[3]; (2) a basic canon of statutory construction dictates a narrow interpretation of statutory exemptions[4]; (3) broad FLSA coverage is essential to accomplish Congress' FLSA goals[5]; (4) the FLSA exemption claim is an affirmative defense; (5) the only explicit determination of salary status was by summary judgment in which all facts and inferences must be viewed in light most favorable to the

[3] *See, Phillips v. Walling*, 324 U.S. 490 (1945); *Mitchell v. Lublin, McGoughy & Assoc.*, 358 U.S. 207, 211 (1959).

[4] *See, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527-29 (1993); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987)(FLSA); and Eskridge and Frickey, "The Rehnquist Court's Canons of Statutory Construction," 108 Harv. L. Rev. 97, 105 (1994).

[5] *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

Sergeants[6], and (6) the Court of Appeals' review was without trial court factual findings.

No matter how the applicable regulations are construed, the Police Board presented no evidence either at summary judgment or trial that the Sergeants were not subject to impermissible disciplinary suspension. Pet. Brf. at 6-16. [7]

Rather, the Board seeks to burden the Sergeants with an obligation to come forward with evidence that they are non-exempt. With full access to all personnel and their personnel files, the Board presented no evidence of a core §541.118(a) agreement guaranteeing no reduction in compensation. The Manual's disciplinary docking rules are not ambiguous, secret, uncommunicated, or

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[7] The Police Board and the United States attempt to parlay a determination on summary judgment that Lieutenant Delgado was not subject to *part day docking* into a determination with regard to the disciplinary docking rule. Resp. Brf. at 17 and U.S. Brf. at 11. The district court judge made no finding that Lieutenant Delgado's compensation was guaranteed against disciplinary docking. Quite the opposite. The Court found that as a matter of fact, Manual Rule 7.004(a)(1) subjected Delgado to possible impermissible penalties. Thus, while it is technically true that Delgado was found to be "salaried" on summary judgment, that finding was in the context in which the Court also concluded as a matter of law that lack of an agreement guaranteeing non-reduced compensation and an express provision subjecting an employee to potential reductions did not endanger salary status. The district court also improperly placed the related burden on the employee. Pet. Brf. at 8 and n. 6.

hypothetical. It states expressly that all commissioned officers, including Sergeants are "subject to" offending disciplinary suspensions. All sergeants know clearly that they can and will be disciplined for the listed offenses.[8] Their compensation is not guaranteed but contingent on the avoidance of Manual violations.

The Board presented no documentary evidence of a policy or practice preventing impermissible suspensions. The Sergeants prevail even if the record were silent on the question of suspensions. In the face of the employer's telling silence, however, the employees offered significant evidence of disciplinary suspensions. That evidence is set forth in the Sergeants' opening brief at 9-16 and 41-42.[9]

The Core Agreement Requirement. The core provision of the salary basis test in 29 C.F.R. § 541.118(a) states that "an employee will be considered to

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[8] Note that the United States Brief states "if an employer effectively communicates that work violations will result in deductions of less than one week's [pay period] pay, the absence of actual deductions would not be dispositive." at 22.

[9] Like the Board, the United States and The League of Cities attempt to shift the burden of proving coverage. The United States suggests that once an employer asserts a claim of exemption, "it would be reasonable to conclude that the employer will enforce its disciplinary rules in a way which is consistent with that intent" even absent evidence that it has done so. U.S. Brf. at 25. The League suggests that "the Police department is entitled to a presumption that it will discipline in a manner that is consistent with preserving the FLSA exemption." League Brief at 24. This improperly places the burden on the employee.

be paid on a salaried basis within the meaning of the regulations if *under his employment agreement* he regularly receives" a predetermined amount of compensation "which amount is not subject to reduction..." (emphasis added.)[10] No core § 541.118(a) agreement exists. The Police Board admitted in its opposition to *certiorari* that "any Sergeant or Lieutenant was 'subject to' a deduction from his predetermined biweekly compensation" for disciplinary reasons. Resp. Opp. Cert. at 7. The Board's own Chief of Police, management witnesses, and FRCP 30(b)(6) designees testified that the Sergeants' compensation was subject to disciplinary docking. (Pet. Brf. at 41-42; Pet. App. at 102a, 217a-219a; and J.A. 13-14, 49-57, 60-64, 76 and 85-88).[11]

The regulation is so constructed that subsection (5)'s disciplinary docking and subsection (6)'s window of correction come into play only if and when an employer has a § 541.118(a) core agreement. The subsections require analysis only when an employer, despite a core agreement, makes a deduction--and then only to test whether the deduction is excuseable for safety reasons or

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[10] The Chamber of Commerce *amici* recognize the core agreement provision, but seem to claim it is not a requirement. Chamber of Commerce Brf. at 10.

[11] Both the Board and the U.S. suggest that this Court should disregard evidence in the record of actual suspensions. Such an argument should be ignored. While a party may waive an issue not raised below, a party does not waive the right to refer to evidence supporting its position on an issue raised below by failing to present an exhaustive analysis of all record evidence in a petition for *Certiorari*.

inadvertance.[12] This case never came to the point which would require full analysis of the subsections on discipline relating to safety or correction for inadvertence.[13]

The Police Board never met its burden of establishing by clear, affirmative and unmistakable evidence its affirmative defense -- indeed, it has presented no evidence -- that the Sergeants' employment agreement protects their compensation from reduction, that Sergeants were not subject to disciplinary docking for part of a pay period, or even that the Guzy deduction was unique. Conversely, the evidence demonstrates that *as a practical matter* everyone understood that Sergeants and Lieutenants were "subject to" impermissible deduction. To this day, the Police Board has never claimed, except by carefully limited, incomplete and guarded statements in appellate advocacy, that Sergeants were not subject to disciplinary suspension.[14] Without at least some evidence of an

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[12] The United States' construction of the subsections supports this construction. U.S. Brf. at 22.

[13] The United States continues to imply that the applicable provision in the Missouri Code provides an alternative to a § 541.118(a) core agreement when it provides that "St. Louis police sergeants *receive* a yearly salary." See U.S. Brief at 10. (emphasis added). However, Missouri Code § 84.160 does not provide that sergeants *shall receive* a set salary. It provides only that "the board of police commissioners *may authorize maximum amounts of compensation*" set forth in a table. (J. A. at 17.) This does not meet the core agreement requirement.

[14] The Board's counsel states that the Board will "continue its existing practice" with regard to disciplinary deductions. Resp. Br. at

agreement to such a guarantee, the Police Board's counsel cannot be heard to argue that the Board met its burden on the salary basis test.

II. DEFERENCE TO DOL'S FLSA REGULATIONS AND NOT TO SOLICITOR GENERAL'S FACTUAL APPLICATION

The Department of Labor's FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118 are

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p. 6, *see also* p. 33. This is misleading. First, these statements are not followed by any cite to the record of an existing practice. Second, counsel's statements are carefully crafted to avoid stating what the "existing" practice is. Instead, at page 6, the counsel invites a new dispute over the scope of "major safety violations" and at page 33 avoids saying what the "existing practice" is to which they are committed. Counsel did state in opposition to *certiorari* that the Board's practice allowed deduction. Resp. Opp. *Cert.* at 7. Finally, these statements are undermined by the fact that all the employer would have been required to do to meet its burden is establish on the record an express policy that the employees work under an agreement which guarantees that their regular compensation is not subject to disciplinary deductions. In recent Courts of Appeals decisions, public employers demonstrated the ease of revising the policy by presenting evidence of their written policies which affirmatively state that the employees will not be subject to improper deductions. *See, Hackett v. Lane County*, 91 F.3d 1289 (9th Cir. 1996); Yourman v. Guiliani, slip op. 95-7561 (2d Cir. 1996), *cert. pending*, 96-152 (Opp. to *Cert.* at 5-6. The actual judgment against New York, which covers a four and one half year period, in the Yourman case is for less than one quarter the severely exaggerated amount New York claims it will owe each year. See, *Yourman* Opp. *Cert.* at 7, n.9.); *Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); and Colorado Statute §24-50-118(3)(a) (1996) (state's change in policy cited in *amicus* brief for Wisconsin, *et al.*, State App. at 124.)

legislative regulations entitled to substantial deference. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[15] A rejection of such deference would challenge the wisdom of Congress' policy choices in charging the DOL with delimiting FLSA exemptions and the wisdom of the DOL in doing so.[16] The DOL's interpretations and opinion letters are also entitled to deference under *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944). If an agency applies its regulations to the facts of a case through administrative adjudication, the outcome must be sustained unless arbitrary and capricious. However, the Solicitor General's *amicus* effort to apply

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[15] As long as an "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given '*controlling weight* unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993)(string citation omitted, emphasis supplied); *see also*, *Rust v. Sullivan*, 500 U.S. 173, 186 (1991); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150 (1991)("It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.'. . . [T]he reviewing court should give effect to the agency's interpretation so long as it is 'reasonable.'") (citations omitted). The United States urges deference for these same reasons. *See*, U.S. Brf. at 16, n. 4.

[16] "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866.

the salary basis regulations to the facts of this case is entitled to no deference. No DOL investigation, regulatory hearing or enforcement activity ever occurred within the St. Louis Police Department. Neither the Secretary of the Labor nor the Solicitor has special familiarity with the facts here.

Thus, the United States' support of Petitioners' position that the salary basis test and disciplinary docking rules are valid as applied to state and local government deserves substantial deference; while the United States' support of Respondents' position that the Petitioners were not subject to impermissible disciplinary deduction and that Respondents may correct the allegedly "unique and single" improper deduction *in this case* by reimbursing the affected employee and promising to comply with the salary basis rule in the future deserves no deference. *See*, United States' Motion for Divided Argument (October, 1996).

Deference to 29 C.F.R. §§ 541.5d and 118(a). Congress expressly delegated to the Secretary of Labor the authority to "define and delimit" from time to time the executive, administrative and professional exemptions (or the "white collar" exemptions) of the FLSA. 29 U.S.C. §213. As such, the DOL's regulations defining and delimiting the "white collar" exemption, including 29 C.F.R. §§ 541.5d and 118(a), must be enforced unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844. Therefore, the St. Louis Police Board's suggestion that the salary basis regulation is invalid as applied to public safety employees is wholly without merit. "A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *see also*,

Chevron, 467 U.S. at 843, n.11

This Court must reject the Police Board's contention that the legislative regulation is invalid in the public sector for at least nine reasons:

1. The FLSA salary basis test is a reasonable exemption standard and effective enforcement component of the national hours of work standard. Pet. Brf. at 31-33.

2. The FLSA disciplinary docking rule is a reasonable exemption standard and a true measure of salaried status. Pet. Brf. 33-36.

3. No less than six times, Congress has considered and rejected amendments to the FLSA which would have eliminated the salary basis test from the public sector. *See, North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982); Pet. Brf. at 27-28, n.21, n.22, and n.23.

4. In enacting the 1985 FLSA Public Sector Amendments, Congress specifically tailored the Act to public agencies, but in no way altered the long standing DOL exemption rules, including the salary basis test and the salary docking rules. This is "persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-275 (1974); *see*, Pet. Brf. 27-28.

5. Since the 1985 FLSA Public Employee Amendments, Congress three times has amended the Act to alter the application of the salary basis test without adjusting its application to public safety employees. *See*, The Computer Programmers Provisions, P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990); The Family and Medical Leave Act, P.L. 103-3, 107 Stat. 6 (February 5, 1993); The Court Reporter Amendment, P.L. 104-26, 109 Stat. 264 (September 6, 1995); and Pet. Brf. at 26-27.

6. The same salary basis test that applies to public employees in state and local government is applied by the Federal Government to its own employees, including police sergeants in the Uniform Division of the Secret Service. *Amshey v. United States*, 26 CL. Ct. 582 (Fed. CL. C.. 1992) (the National League of Cities *amici* cite 35 Ct. CL. 358, as *vacating* the *Amshey* decision. However, only the portion of the Court's Order requiring a specific form of compliance was vacated on the basis of a settlement. The application of the original decision and the fact that Uniform Division sergeants and lieutenants are subject to the salary basis test is uncontested by the Treasury Department in currently pending Court of Claims litigation, *Abbott v. United States*, Case No. 94-651C (Judge Robert J. Yock)(Fed. CL. Ct.).

7. In 1995, Congress applied the FLSA, including the salary basis test and the disciplinary docking rule, to its own employees. The Congressional Accountability Act of 1995 (P.L. 104-1, 109 Stat.3); Pet. Brf. at 26.

8. The DOL knowingly and expressly rejected public employees' anti-disciplinary docking argument during its 1991-92 rule making process on "public accountability" of the salary basis test. 57 Fed. Reg. 37674 (August 19, 1992); Pet. Brf. at n. 24 and Pet. App. at 210a.

9. Neither the Police Board nor their *amici* supporters explain why public employers are any more likely than private employers to subject truly exempt employees to disciplinary suspensions without pay. No State Constitutional requirements or unique problems of public accountability mandate that such penalties be among the tools in public employers' disciplinary arsenal.[17]

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[17] In fact, there is an inescapable inconsistency between the argument that all public safety employees must be subject to this

No Deference To Solicitor General's Factual Analysis. The Solicitor General is entitled to no deference for his factual conclusions about a case in which the DOL is not a party, for which DOL has not been involved prior to the Supreme Court level, and for which DOL has played no role as an agency adjudicator.

When the DOL's factual interpretations are not reached as a result of an adversarial hearing proceeding, "[t]hey do not constitute an interpretation of the Act or a standard for judging actual situations which binds" the courts. *Skidmore*, 323 U.S. at 139. In fact, this Court has specifically refused to grant deference under *Chevron* "to agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice." *Bowen v. Georgetown*, 408 U.S. 204, 212 (1988). Further, this Court has refused deference to the Solicitor General's interpretation enunciated in litigation because "'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Id.* (citations omitted).

The Solicitor General is attempting to apply interpretations to facts in a tortured effort to reach a litigation position. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen*, 488 U.S. at 213. The Solicitor's entire factual argument should be ignored.

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particular form of discipline and the Police Board's claim that it does not subject sergeants to it.

III. THE ELEVENTH AMENDMENT.

This is not a case in which the Court should address the Eleventh Amendment. The Police Board asserts for the first time that it is not subject to suit in federal court. Contrary to the Board's claim, *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114 (1996) does not hold that federal courts have no jurisdiction in a case such as this. The Police Board is not a State Government within the meaning of the Eleventh Amendment. This case does not invoke the specter of federal court jurisdiction or control over the treasury of one of the 50 states. The Sergeants are not "citizens of another state or a foreign government" within the meaning of the Eleventh Amendment. If immunity is at issue, it is not the developing Eleventh Amendment variety, but more traditional Article III immunity. The Sergeants seek a judgment solely against the Police Board. The Police Board waived immunity.

The Board Is Not An Arm of the State. In support of their claim that the true party in interest is Missouri, the Police Board points to (a) the amended complaint's statement that it is the "governing state agency authority for the St. Louis Police Department," (b) the Missouri Code provision that establishes the Board, and (c) the Governor's power to appoint the members of the Board. Resp. Brf. at 7-10. However, these are insufficient to confer "State" status for Eleventh Amendment purposes.

This Court has consistently held that the Eleventh Amendment does not deprive the federal courts of jurisdiction over suits against political subdivisions. "[C]ities and counties do not enjoy Eleventh Amendment immunity." *Hess v. Port Authority Trans-Hudson Corp.*,

115 S. Ct. 394, 404 (1994). This is true even though political subdivisions exercise a "slice of state power." *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 401-02 (1979). *See, also, Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 280-81 (1977); *County of Lincoln v. Luning*, 133 U.S. 529 (1890).

The Court's Financial Responsibility Test.

Political subdivisions are protected by the amendment only if a money judgment against them would have the same consequence as a judgment against the State itself. This is the holding of *Hess*. In that case, this Court expressly rejected the two arguments made by the Board here: That the Board is an arm of the State because (1) it is created by State law, and (2) the Governor appoints its members. As this Court pointed out, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. '[P]olitical subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity." *Hess*, 115 S.Ct. at 404 (citations omitted). "[R]endering control dispositive," this Court reasoned, "does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." *Id.*

Notably absent from the Police Board's brief is any discussion of financial responsibility. The Missouri Code rests financial responsibility for the police department, not with the State, but with the City of St. Louis. The Police Board must "pass upon all claims presented against them for the expenses incurred in the discharge of their duties. . . and such claims and salary rolls. . . *shall be duly audited and paid by the proper disbursing officer or officers of said cities. . . out of any moneys in the city treasury...*"

§84.210 R.S. Mo. (1995) (emphasis added). The Code further provides that "[i]t is the duty of the municipal assembly or common council of the cities to make the necessary appropriation for the expenses of the maintenance of the police force in the manner herein provided. . . ." §84.160 R.S. Mo. (J.A. at 18). The Board must prepare an annual estimate of expenses to provide to the City. The City is "required to set apart and appropriate the amount so certified, payable out of the revenue of said cities. . . " [18] Once the appropriation is made, the Board does *not* have the authority to transfer funds appropriated for one line item to another without the prior approval of the Municipal Board of Estimate and Apportionment. §84.210 R.S. Mo. (1995). Finally, the Board is vested with the authority to provide themselves with offices, furniture and employees as well as to adopt a common seal. The fiscal responsibility for these items is not a burden of the State, but is the responsibility of the City. If the Mayor or Council "refuse to set aside and appropriate the revenue necessary to carry out the

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[18] A state court has ruled that the Board is a "state agency" for the purposes of the Hancock Amendment, State Constitutional Amendment 21, (Missouri's version of unfunded mandate protection). The Amendment provides that once the Board certifies its budget for the year, if the city refuses to fund the budget for "new activities" certified by the Board, the Board may not sue the city. *Missouri v. Zych*, 642 S.W. 2d 907 (Mo. 1992). Nothing in this ruling detracts from the Code provisions mandating the city treasury as responsible for funding the police department, its salaries and claims against it. All that is prevented is the Board's creating unfunded mandates for the city. The Hancock Amendment does not open the state treasury to demands resulting from employee compensation judgments against the Board. The *Hess* Court recognized the Port Authority was not a State agency for Eleventh Amendment purposes, despite state court rulings describing it as a state agency. 115 S. Ct. at 403.

provisions of section 84.010 to 84.340," the Board may apply to the circuit court to compel City appropriations. §84.190 R.S. Mo. (1995).

On summary judgment, the trial judge noted that the Board is "solely financed by a municipality." (Pet. App. at 69a). The trial judge clearly recognized that the City and not the State would be responsible for any judgment. See Post-Trial Hearing Trans. at 7, 19, 38-39, and 49; see also testimony of the Board's Deputy Chief and a F.R.C.P. 30(b)(6) designee. (J.A. at 70 and 82).

In the *Hess* case, the Port Authority did receive some of its funding from the State, but the Court found there was no statutory requirement that the state fund the Authority as it was structured to be self-sustaining. In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), this Court also refused to find the Board an arm of the State although it received "a significant amount of money from the State." *Id.* at 280. Looking to the governing statutes on balance, the Court found that it was more like a county or city despite from where the revenues came. Similarly, as discussed below, even if the State treasury point is left aside, on balance, the Missouri Code reveals that the Board operates as an independent entity answering on occasion to the City and never to the State. It functions much more like a City than an arm of the State.

Here, however, there is no evidence of any monies coming from the State. Under the statutory framework, any judgment in this case will not be paid out of the State treasury. Thus, under this Court's holding in *Hess*, the Board is not entitled to Eleventh Amendment immunity.

The Minority's State Control Test. It is not necessary to rest solely on the "State Treasury" factor to find that the Police Board is not an arm of the State. The Police Board fairs no better under the control test. Justice O'Connor, writing for the dissent, stated that the appropriate test is the degree of control the State retains in oversight of the entity. *Hess*, 115 S. Ct. at 411 (O'Connor, J., dissenting; (emphasis added)). The dissent pointed to the fact that the Governors appointed the members in *Hess*, that the Governors had veto power over the decisions of the Port Authority, that the Port Authority was required to report annually to the State legislatures and that the State legislatures were required to approve changes in any rules or new projects. *Id.* at 411-12.

In this case, the Governor of Missouri appoints four of five members of the Board. However, that is where the State control ends. The State Code mandates the basic authority for the Board. Neither the State legislature nor the Governor have control or oversight over the operation of the Board. Neither the Governor nor the State legislature have veto or approval power over any decisions of the Board.

The creation of, and authority of, the Board falls under the heading "Cities, Towns and Villages" in the Missouri Code. The Board is comprised of five members. The fifth is the Mayor of St. Louis. §84.020 R.S. Mo. (1995). The Board, and not the Governor, determine who shall be President, and each officer of the Board. *Id.* The Board determines who the Treasurer will be. The Treasurer can only be removed from that position by the Board. §84.050 R.S. Mo. (1995). The Code expressly states that the Board is authorized to declare emergencies and that its authority "shall not be subject to review by

any other power." §84.110 R.S. Mo. (1995). Similarly, the Board is vested with the exclusive authority to remove a police officer. §§84.120 and 84.150 R.S. Mo. (1995). The Board has the authority to hire police officers in excess of the number authorized by statute with the approval of the Municipal Board of Estimate and Apportionment. §§84.100 and 84.150 R.S. Mo. (1995). The Board has the exclusive authority to make all rules and regulations necessary for the "appointment, employment, uniforming, discipline, trial and government of the police." §84.170 R.S. Mo. (1995). Moreover, the State has its own police force whose salaries are set in accordance with other state employees. See, §§43.010-030 R.S. Mo. (1995).[19]

The Board was created in the Progressive Era to address muckraker's exposure of corruption by politicians within the City Police Department. The reformer's goal was to take politics, whether at the State or City level, out of policing. Direct citizen, not State Government, control was the progressive reform model.[20] Suit against the members of the St. Louis Police Board of Commissioners cannot be construed as an "affront to the dignity" of Missouri. *Hess* 115 S.Ct. at 401 and 406.

Immunity Waived. The St. Louis Police Board members have waived any immunity. The Board admitted jurisdiction of the federal district court in its answers to

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[19] The legislature has created a similar board in the Kansas City Police Department. §84.360 R.S. Mo. (1995). *See, Mt. Healthy*, 429 U.S. at 280.

[20] Morrison and Commanger, "Progressism in Politics," Growth of the American Republic (1961) at 470.

the complaint and amended complaint. Obviously, mere appearance to defend a case does not waive immunity or prevent this Court from reviewing the matter. *Ford Motor Co. v. Treasury Department*, 323 U.S. 460, 467 (1945). However, the Police Board members have done more than fail to raise the issue in the lower courts. The Board expressly conceded jurisdiction of the federal courts in this case.

The Board initially filed a Motion to Dismiss for Lack of Jurisdiction which complained of lack of jurisdiction to hear claims against Board members in their individual capacity. It expressly "concede[d] the jurisdiction of this Court to hear the claims stated by Plaintiffs under the FLSA against them in their official capacities as members of the Board of the Police Commissioners."

In as much as the Police Board appeared in Federal Court and affirmatively pled that there was jurisdiction to hear a case against the Board members in their official capacity, they have waived any immunity claim that may have attached. [21] *See, Gunter v. Atlantic C. L. R. Co.*,

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[21] Immunity is also waived when the state appears in federal court and consents to court orders awarding damages or other retroactive relief if its position on the merits is rejected by the court. *Toll v. Moreno*, 458 U.S. 1, 17-18 (1982); *see also*, Rotunda and Nowak, *Treatise on Constitutional Law Substance and Procedure*, §2.12 (West Publishing, 1996). As the Board stated in the Eighth Circuit and most recently to this Court it is "committed to reimbursing [Guzy] for the two (2) days pay" if the courts finally judge the Police Board to have violated the law. Res. Brf. at 32. Similarly, the Police Board stipulated to a Consent Judgment against it in the trial court of $9,248. (Aug. 1994).

200 U.S. 273 (1906); *Petty v. Tennessee-Missouri Bridge Company*, 359 U.S. 275 (1959).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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